

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 81

[CA 109-RECLAS; FRL-]

**Finding of Failure to Attain and Reclassification to Serious
Nonattainment; Imperial Valley Planning Area; California;
Particulate Matter of 10 Microns or Less**

AGENCY: Environmental Protection Agency.

ACTION: Final Rule.

SUMMARY: EPA is taking final action under the Clean Air Act (CAA) to find that the Imperial Valley Planning Area (Imperial Valley), a moderate nonattainment area for particulate matter of 10 microns or less (PM-10), failed to attain the National Ambient Air Quality Standards (NAAQS) by the statutory deadline of December 31, 1994, and to reclassify the area as a serious PM-10 nonattainment area. Today's action is in response to a recent decision by the U.S. Court of Appeals for the Ninth Circuit that vacated EPA's earlier approval of Imperial County's demonstration that the Imperial Valley would have attained the NAAQS by December 31, 1994 but for emissions emanating from outside the United States, i.e., Mexico. EPA's approval had the effect of allowing Imperial Valley to remain a moderate nonattainment area. In vacating that approval, the Court specifically directed EPA to reclassify Imperial Valley as a serious PM-10 nonattainment area.

EFFECTIVE DATE: This rule is effective on [Insert date 30 days from publication].

ADDRESSES: You can inspect and copy the docket for this action at our Region IX office during normal business hours (see address below). Due to increased security, we suggest that you call at least 24 hours prior to visiting the Regional Office so that we can make arrangements to have someone meet you. The Federal Register notice is also available as an electronic file on EPA's Region 9 Web Page at <http://www.epa.gov/region09/air>

Planning Office (AIR-2), Air Division,
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SUPPLEMENTARY INFORMATION: Throughout this document, the words "we," "us," or "our" mean U.S. EPA.

I. Background

Imperial County is located in the southeastern corner of California. It has borders with Mexico to the south, Arizona to the east, and San Diego County to the west. Most of Imperial County falls within the Imperial Valley Planning Area (Imperial Valley). 40 CFR part 81.

Since the 1990 Amendments to the CAA, Imperial Valley has been classified as a moderate PM-10 non-attainment area. The CAA

requires that moderate areas attain the PM-10 NAAQS by December 31, 1994. CAA section 188(c)(1). Moderate areas failing to attain the NAAQS by the prescribed attainment date must be reclassified as "serious" under CAA section 188(b)(2). However, CAA section 179(B)(d) provides that any area that establishes to the satisfaction of EPA that it would have attained the PM-10 NAAQS by the applicable attainment date but for emissions emanating from outside the United States, is not subject to the provisions of CAA section 182(b)(2), i.e., reclassification to "serious" nonattainment.

The Imperial County Air Pollution Control District (ICAPCD) and the California Air Resources Board (CARB) submitted evidence that Imperial Valley would have attained the PM-10 NAAQS by the 1994 attainment date but for transport from Mexico. The primary information prepared by ICAPCD is the "Imperial County PM-10 Attainment Demonstration" (179B(d) demonstration) which CARB submitted to EPA on July 18, 2001.

On August 10, 2001 EPA published in the Federal Register a proposed rule that considered two alternatives. 66 FR 42187. Our first alternative proposed to find that the State of California had established to EPA's satisfaction that Imperial Valley would have attained the PM-10 NAAQS by the applicable CAA attainment date, December 31, 1994, but for emissions emanating from Mexico. Our second alternative proposed, based on monitored

data during the years 1992 - 1994, to find that Imperial Valley did not attain the PM-10 NAAQS by its CAA mandated attainment date. This second proposal, if finalized, would have resulted in the area's reclassification to serious.

After consideration of the 179B(d) demonstration and the comments received on the proposal, on October 19, 2001, we finalized our first proposed alternative which found that Imperial Valley would have attained the PM-10 NAAQS by December 1994 but for PM-10 emissions emanating from Mexico. 66 FR 53106.

The Sierra Club petitioned for review of our October 2001 final action in the U.S. Court of Appeals for the Ninth Circuit. On October 9, 2003 the Court issued its opinion. Sierra Club v. United States Environmental Protection Agency, et al., 352 F.3d 1186. The Court rejected EPA's factual determination with respect to two days, January 19 and 25, 1993, on which PM-10 exceedances of the 24-hour PM-10 NAAQS occurred, finding that "[b]ased on the data and the reports in the record, there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedances...." The effect of this conclusion is that the Imperial Valley had exceedances of the PM-10 NAAQS that preclude a finding that the area would have attained the NAAQS by 1994. The Court, concluding that further administrative proceedings with respect to the 1994 exceedances would serve no useful purpose, instructed EPA to reclassify Imperial Valley as a

serious PM-10 nonattainment area.

On December 18, 2003, the Ninth Circuit denied a petition for rehearing by ICAPCD, an intervener in the case, slightly revised its October 9, 2003 opinion, and granted ICAPCD's motion to stay the mandate until March 17, 2004 to permit ICAPCD to file a petition for a writ of certiorari in the U.S. Supreme Court. Imperial County did so on March 17, 2004. On June 21, 2004, the Supreme Court declined to hear the case. Imperial County Air Pollution Control District v. Sierra Club, et al., 72 U.S.L.W. 3757. Thereafter the stay was lifted and the mandate issued.

II. Final Action

A. Rule

In response to the Ninth Circuit's October 9, 2003 opinion, and pursuant to CAA section 188(b)(2), EPA is finding that Imperial Valley failed to attain the PM-10 NAAQS by the statutory deadline of December 31, 1994, and is therefore reclassifying the area from a moderate to a serious PM-10 nonattainment area.¹ Today's final action applies to the entire Imperial Valley planning area which includes the Quechan Indian Tribe in the southeastern corner of the area, and the Torrez-Martinez Tribe in

¹ Note that as a result of the Court's opinion and order, we are not taking action on our August 10, 2001 alternative proposal to find that Imperial Valley failed to attain the PM-10 NAAQS by the moderate area statutory deadline. Instead we are adopting the Court's factual determination in today's final finding.

the northwestern corner of the area. EPA has contacted both Tribes to discuss the non-discretionary nature of this action and how the rulemaking may impact them.

All serious PM-10 nonattainment areas were required to attain the standards by no later than December 31, 2001 unless granted a one-time extension of up to five years. CAA section 188(c)(2) and (e). Elsewhere in this Federal Register, we are proposing to find that Imperial Valley failed to attain by December 31, 2001.

B. Notice and Comment under the Administrative Procedure Act

While this rule constitutes final agency action, EPA finds good cause to forego prior notice and comment under the Administrative Procedure Act (APA), 5 U.S.C. 553(b). Notice and comment are unnecessary because no EPA judgment is involved in adopting the Ninth Circuit Court of Appeals' factual determination in Sierra Club that Imperial Valley failed to attain the PM-10 standards by December 31, 1994 and in carrying out the Court's order to reclassify the area from moderate to serious nonattainment. In short, EPA is simply implementing administratively a result that was compelled by the Court.

III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and

therefore is not subject to review by the Office of Management and Budget. EPA has determined that the finding of failure to attain would not result in any of the effects identified in Executive Order 12866 sec. 3(f). Findings of failure to attain under section 188(b)(2) of the CAA are based solely upon air quality considerations and the subsequent nonattainment area reclassification must occur by operation of law in light of those air quality conditions. These actions do not, in and of themselves, impose any new requirements on any sectors of the economy. In addition, because the statutory requirements are clearly defined with respect to the differently classified areas, and because those requirements are automatically triggered by classifications that, in turn, are triggered by air quality values, findings of failure to attain and reclassification cannot be said to impose a materially adverse impact on State, local, or tribal governments or communities. For the aforementioned reasons, this action is also not subject to Executive Order 32111, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). These actions do not contain any unfunded mandate or significantly or uniquely affect small governments, as described

in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) for the following reasons: (1) The finding of failure to attain is a factual determination based on air quality considerations; and (2) the resulting reclassification must occur by operation of law and will not impose any federal intergovernmental mandate. Two Indian tribes have reservations located within the boundaries of Imperial County. EPA is responsible for the implementation of federal Clean Air Act programs in Indian country, including reclassifications. EPA has notified the affected tribal officials and will be consulting with them, as provided for by Executive Order 13175 (65 FR 67249, November 9, 2000). Because EPA is required by Court Order to reclassify the Imperial Valley PM-10 planning area to serious nonattainment, and because reclassifications in and of themselves do not impose any federal intergovernmental mandate, this rule also does not have Federalism implications as it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). These actions are also not subject to Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Rules," (62 FR 19885, April 23, 1997), because they are not economically significant. As discussed above, findings of

failure to attain under section 188(b)(2) of the CAA are based solely upon air quality considerations and the subsequent nonattainment area reclassification must occur by operation of law in light of those air quality conditions. In this context, it would thus be inconsistent with applicable law for EPA, when it makes a finding of failure to attain to use voluntary consensus standards. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 81

Environmental Protection, Air Pollution Control, National Parks,
Wilderness Areas.

8/03/04

Dated

___/s/_____

Wayne Nastri

Regional Administrator

Region IX

PART 81 - [AMENDED]

1. The Authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. Section 81.305 is amended in the table for "California - PM-10" by revising the entry for "Imperial County, Imperial Valley Planning Area," to read as follows:

§81.305 California.

* * * * *

California-PM-10

Designated Area	Designation		Classification	
	Date	Type	Date	Type
<p>* * * * *</p> <p>Imperial County</p> <p>Imperial Valley planning area</p> <p>* * * * *</p>	<p>November</p> <p>15, 1990</p>	<p>Nonattainment</p>	<p><u>[Insert date</u></p> <p><u>30 days</u></p> <p><u>after</u></p> <p><u>publication]</u></p>	<p>Serious</p>

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